Filed 8/19/04 Conservatorship of Wilson CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Conservatorship of the Estate of ROBERTA F. WILSON.	
RAMON HERRERA, Petitioner and Respondent, v. ROBERTA BUGENIG, Objector and Appellant.	A103472 (Humboldt County Super. Ct. No. PRO 20156)

Roberta Bugenig appeals from an order appointing respondent Ramon Herrera, the Humboldt County Public Guardian, as probate conservator of conservatee Roberta F. Wilson. Appellant contends that (a) respondent failed to meet his burden of proving the need for a conservatorship by clear and convincing evidence; (b) the trial court erred in failing to appoint appellant as Wilson's conservator; (c) the trial court violated Wilson's privacy "privilege" by requiring her to testify about her finances; and (d) certain medical testimony regarding the conservatee's lack of capacity was erroneously admitted. None of appellant's contentions has merit. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Wilson, the conservatee, was born on March 26, 1920. At the time of the conservatorship hearing on April 14, 2003, she was 83 years of age. Appellant is Wilson's daughter. On February 13, 2002, Marilyn Cottrell, a social worker with the

Humboldt County Department of Health and Human Services, Adult Protective Services, wrote a letter to respondent requesting that he obtain a temporary conservatorship of Wilson, in order to evaluate the need to seek a probate conservatorship of Wilson's estate based on possible mismanagement and misuse of Wilson's assets by family members, including appellant.

On April 16, 2002, in response to the concerns set out in Cottrell's letter, respondent filed petitions for appointment of a temporary and probate conservator of the person and the estate of Wilson, on the grounds she was unable to provide for her personal needs and was substantially unable to manage her financial resources or resist fraud or undue influence. On that same date, the probate court issued an order appointing a court investigator and setting a hearing on the petitions. On April 17, 2002, the court appointed respondent temporary conservator of the person and the estate of Wilson.

On May 28, 2002, through her attorney, appellant filed opposition to the petitions, contending that there was no need for a conservatorship because Wilson was competent. Appellant asserted that "the heart of the problem" was that Wilson's granddaughter "wants control over her grandmother's money," and that appellant herself should be left in control of Wilson's care. At the request of appellant's attorney, a hearing on respondent's petition was continued, with the orders establishing the temporary conservancy remaining in effect. Discovery thereafter ensued, with extensive litigation between the parties concerning, among other things, alleged conflicts of interest by respondent's attorney and the confidentiality of evidence of Wilson's finances obtained by respondent.

The hearing on the conservancy petition ultimately commenced on April 14, 2003, with the trial court hearing and ruling on a number of motions in limine offered by both parties. In support of his contention that Wilson lacked the capacity to manage her affairs, respondent offered the testimony of several witnesses. Blair Angus, an attorney in the office of the Humboldt County Public Defender, testified that she was the initial counsel appointed to represent Wilson's interests. In that capacity, she approved a

request by respondent that Wilson be examined by Bradley Strong, M.D., a psychiatrist.[1] Angus testified that she agreed to Dr. Strong's examination of Wilson because she needed an independent evaluation of Wilson's mental state in order to ascertain and defend her client's best interests with respect to the issue of alleged undue influence.

Dr. Strong conducted a diagnostic interview and cognitive examination of Wilson in February 2003. He described his method of examination as observation of Wilson's behavior, mood, reasoning process, capacity to discuss her own finances and health care, and cognitive ability. In preparation for the interview, Dr. Strong reviewed materials provided by respondent, by Adult Protective Service, and Wilson's personal medical records. Dr. Strong told Wilson the reasons for the interview, and attempted to discuss with her details of her financial and medical affairs. At first, Wilson did not appear cooperative. According to Dr. Strong, the cognitive examination indicated that Wilson had deficits in her memory, verbal fluency, ability to name, and in executive function. Based on his interview and cognitive examination of Wilson, Dr. Strong opined that Wilson did not have the capacity to manage her financial affairs, or to formulate her own decisions about her medical needs.

Marilyn Cottrell, the social worker who had written the original letter bringing Wilson to respondent's attention, testified that she had worked for Humboldt County Adult Protective Services for 17 years, investigating cases of possible neglect or abuse, formulating plans to remedy such situations, and, if necessary, referring potential conservatorships to the Humboldt County Public Guardian. Prior to writing the letter in this case, she met with Wilson on three occasions in 2001 and 2002. The trial court ruled that Cottrell could testify about Wilson's statements to her either as admissions by Wilson, or as going to Wilson's state of mind.

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[1] Dr. Strong, a psychiatrist certified by the American Board of Psychiatry and Neurology and the American Board of Family Practice, served as a staff psychiatrist at Humboldt County Mental Health from July 2001 until January 2003. Between that date and the time of the hearing in April 2003, Dr. Strong practiced psychiatry at the Veterans Administration health clinic in Eureka.

Cottrell testified that in her first interview with Wilson at an elder care home, the latter had trouble remembering a document she had allegedly signed, although she recognized her signature. Wilson's signature on the document was dated May 1998, but was notarized in May 2001. After the meeting, Cottrell observed Wilson apparently hallucinating the presence of children and animals in a hallway. Based on her observations, Cottrell undertook further investigation into Wilson' competence, mental state, and ability to handle her finances. Cottrell proceeded to evaluate financial documents and records she had obtained from Wilson's personal attorney and Wilson's granddaughter. These records showed large sums being withdrawn from Wilson's accounts. In Cottrell's second interview with Wilson, the latter "didn't really remember" changes in her financial documents. At another meeting by Cottrell with Wilson in July 2001, Wilson appeared to hallucinate that she had seen "[a] comb or some object that wasn't there." Based on her review of these documents and her observations of Wilson, Cottrell came to the conclusion that Wilson needed a conservator for both her finances and her person, and therefore referred the matter to the Public Guardian.

Jennifer Farley was a senior probation officer for the Humboldt County Probation Department, and had served as a court investigator. In May 2002, Farley interviewed Wilson at an elder care facility in the course of an investigation into her potential conservatorship. During the course of the interview, Farley informed Wilson of the purpose and nature of the interview. Farley testified that although Wilson at first "appeared to have some understanding" of what was happening, as the interview progressed, Wilson "appeared to be confused." Wilson thought she was being sued, causing Farley to again explain the nature of a conservatorship and what it meant for Wilson. The only aspect of her finances Wilson was willing to discuss was the amount she received from Social Security. As a result of the interview, Farley came to the conclusion that a conservatorship of both her person and her finances would be in Wilson's best interests.

Respondent Herrera testified that, as of the time of the hearing, he had served as Public Guardian and Conservator for the County of Humboldt for over 13 years, prior to which time he had served as Deputy Public Guardian for Santa Cruz County. his duties included acting as conservator for individuals in need of assistance with their finances or medical care. After being informed of Wilson's situation by Cottrell and Humboldt County Adult Protective services, respondent undertook an investigation of Wilson's situation and met with her to discuss the petition for a conservatorship. Respondent testified that when he interviewed her, Wilson was unable to be specific about her finances, how much money she had, or in which bank or banks she kept her money. Through Cottrell, respondent obtained a "capacity declaration" from the office of Lawrence J. Wieland, M.D., stating that Wilson suffered from dementia, impaired memory, "general confusion," thought disorders (including hallucinations), with moderate to major impairment in the areas of information processing (including reasoning); and that she needed antipsychotic medication to control her agitated and aggressive behavior. Wilson was under the continuing care of Dr. Wieland and his nurse practitioner in February and March 2002, when the capacity declaration was prepared.

Respondent called appellant Bugenig as a witness. Appellant testified that she was "[r]etired" from cattle ranching, and "self-employed," engaging in both "logging" and "rais[ing] stock dogs." She acknowledged handling Wilson's finances for the previous two years in her capacity as the trustee of an irrevocable trust created by Wilson and appellant's stepfather approximately five years earlier. In that capacity, appellant had paid Wilson's bills, handled her affairs, and made "arrangements for everything that was necessary." Appellant testified that she earned sufficient income to support herself by raising "livestock dogs," and working on her property. However, she acknowledged commingling her own money with that of Wilson in a joint account, and using her capacity as trustee with a durable power of attorney to withdraw sums of money from Wilson's accounts.

Thus, appellant acknowledged withdrawing $9,000 from a joint account she held with her mother, and depositing it in a separate account in her own name alone. Appellant also withdrew $5,000 from the joint account, which she deposited "elsewhere." Appellant testified that she made this particular withdrawal because various people—including her son-in-law, and counsel for respondent for Wilson—"were interfering in [her] mother's affairs." She could not recall exactly where she deposited this particular sum.

Appellant also acknowledged other, much larger withdrawals. She withdrew $20,000 in the form of a cashier's check, which she deposited in a bank which she could no longer identify. Appellant asserted that she did this for the benefit of Wilson, on account of "interference from two attorneys and [her] son-in-law." Over time, appellant wrote numerous checks to herself and others on Wilson's accounts, in varying amounts. At one point, appellant closed one of Wilson's trust accounts—with a balance of $112,890.14—and placed the proceeds, in the form of a cashier's check payable to herself, in a safe deposit box. Later, she deposited the proceeds in a "Wilson Family Trust account." Appellant did the same with the proceeds of another of Wilson's trust accounts, with a balance of $88,702.66. Appellant acknowledged that although she did not "own" any of these sums belonging to Wilson, the "trust" account in which she deposited them was a joint account she had opened herself in both Wilson's name and her own. In this way, appellant ultimately closed all of Wilson's accounts at Humboldt Bank, depositing the proceeds into joint checking accounts at two other banks.

Appellant called two witnesses on her behalf: John Gambin, M.D. and Wilson herself. Dr. Gambin, a Board certified neurologist, had seen Wilson on eight or nine occasions, treating her for a stroke, Parkinson's disease, and "mild memory impairment." He testified that Wilson's recent and "immediate" memory was impaired more than her "distant" memory. Dr. Gambin acknowledged that Wilson was receiving medication both for her memory and "for behavioral issues" possibly associated with hallucinations and Parkinson's disease; and that she failed to remember all the words in a memory test

even when given prompts. Nevertheless, Dr. Gambin opined that Wilson was "competent" to take care of both her person and her finances.

Wilson testified that she did not want a conservator appointed for her because she "can do [her] own business." She also testified that appellant helped her to "do things," "[b]ecause she's my daughter." Asked whether appellant explained what she was doing for her, Wilson said, "[p]retty much most of the time." If a conservator was to be appointed, Wilson testified, "I want my daughter." Questioned whether she had any interest in a trust, Wilson at first did not understand what was being asked. Then she testified that she owned "part of it." Asked which part she owned, she said "I don't think that's any of your business." Wilson testified that all her money was at Humboldt Bank, and she had no other accounts. She refused to say how much money she had in her accounts at Humboldt Bank, and resisted answering any other questions about her assets. Asked whether she had ever given appellant permission to take money out of her Humboldt Bank accounts and place it in other accounts, Wilson at first said "I don't know." Asked specifically if she had told appellant to take more than $100,000 out of one of her accounts and get a cashier's check, Wilson said "[n]o."

At the conclusion of the second day of trial, April 15, 2003, the court found that Wilson appeared to be "substantially unable at this point to manage her financial resources" or to "resist fraud or undue influence," and therefore required appointment of a conservator. The court found that it was a violation of appellant's fiduciary duty, as possessor of a durable power of attorney over her mother's accounts, to have a joint account with her. Appellant requested appointment as conservator, but counsel for respondent noted that she had not filed any petition to be appointed as such.[2] The court then appointed respondent as conservator of Wilson's estate, in his capacity as Public Guardian. Appellant's subsequent request for a statement of decision was denied on the

[2] The record does contain a document entitled "Nomination of Conservator of Person and Estate," filed on April 15, 2003, nominating appellant as conservator of Wilson's person and estate. Although the record is unclear, it appears from the discussion on the record of the hearing that this document was filed after the hearing.

ground the hearing on the petition lasted less than eight hours. (Code Civ. Proc., § 632.) The trial court's written order appointing respondent probate conservator of Wilson's financial resources was filed on May 27, 2003, together with the court's letters of conservatorship of the estate of Wilson. This appeal followed.

SUFFICIENCY OF EVIDENCE TO SUPPORT DECISION

Appellant first contends that respondent failed to meet the burden of proof for establishment of a probate conservancy. The contention is meritless. Respondent met the applicable burden of proof, and the trial court's decision appointing him conservator of Wilson's estate was supported by substantial evidence in the record.

Under Probate Code section 1801, subdivision (b), "[a] conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence." Probate Code section 1801, subdivision (e) in turn provides that "[t]he standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence." " 'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.) Under the "clear and convincing" standard of proof, the evidence adduced to support a conclusion of fact must "be ' "so clear as to leave no substantial doubt" [and] "sufficiently strong to command the unhesitating assent of every reasonable mind." ' [Citation.]" (*Ibid.*)

The requirement of producing clear and convincing evidence applies only in the trial court. A trial judge may reject a showing as not meeting this standard. However, if the trial court decides in favor of a party with this heavy burden, the clear and convincing test disappears. On appeal, the usual rule of conflicting evidence is applied, considering all of the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference from the evidence tending to establish the correctness of the fact finder's decision, and resolving conflicts in support of the judgment. (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 601-604; *Rubin v. Los Angeles Fed. Sav. & Loan Assn.* (1984) 159 Cal.App.3d 292, 298; *United*

Professional Planning, Inc. v. Superior Court (1970) 9 Cal.App.3d 377, 387; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 359-365, pp. 408-415.)

With regard to respondent's alleged failure to meet the applicable burden of proof, appellant has not cited anything in the record showing a failure on the part of the trial court to follow the clear and convincing evidence standard in making its determination, or demonstrating that the standard was not met. To the contrary, the record shows the trial court specifically *required* respondent to meet this standard, and counsel for respondent explicitly presented respondent's case to the trial court on that basis, arguing that the clear and convincing standard had been met.

As for the sufficiency of the evidence to support the judgment, the record is replete with ample substantial evidence supporting the trial court's determination, on the basis of clear and convincing evidence, that Wilson was substantially unable to manage her own financial resources or resist fraud or undue influence. Dr. Strong testified on the basis of his experience, expertise and examination of Wilson that she did not have the capacity to handle her financial affairs. Cottrell testified to having observed Wilson apparently hallucinate on more than one occasion, as well as to the difficulty Wilson had remembering financial documents she had signed. Similar testimony about Wilson's evident difficulty following conversations or comprehending her financial affairs was provided by Farley. Appellant herself acknowledged using the durable power of attorney Wilson had given her to transfer large amount of cash from Wilson's trust accounts into checking accounts held *jointly* by Wilson and appellant, commingling her own funds with those of Wilson and, in the process, closing *all* of Wilson's accounts at Humboldt Bank. Perhaps most significantly, Wilson's own testimony—insisting that all her money was held in accounts at Humboldt Bank, and denying that she had given appellant authority to transfer large sums of money to other accounts—convincingly demonstrated that she had no grasp of her financial condition, much less any knowledge of what appellant was doing with her assets. On this record, and under the applicable standard of

appellate review, we conclude there was substantial evidence to support the trial court's determination under Probate Code section 1801.

NO GROUNDS TO APPOINT APPELLANT AS CONSERVATOR

Appellant contends the trial court erred in not appointing her as Wilson's conservator, based on Wilson's expressed preference for such an appointment. On the record before us, appellant's contention lacks merit.

Probate Code section 1810 provides: "If the proposed conservatee has sufficient capacity at the time to form an intelligent preference, the proposed conservatee may nominate a conservator in the petition or in a writing signed either before or after the petition is filed. The court shall appoint the nominee as conservator unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee." Appellant cites and relies on *Conservatorship of Ramirez* (2001) 90 Cal.App.4th 390, in which the appellate court reversed a trial court's appointment of two professional conservators over the expressed wishes of the conservatee that her son continue to act as her conservator. (*Id.* at pp. 400-403.)

Appellant is correct that *Ramirez* is on point.[3] She incorrectly interprets the effect of its holding on the facts of this case, however. In *Ramirez*, the appellate court reversed on the basis of its specific holding that there was "*no* substantial evidence to sustain the [lower] court's findings." (*Id.* at p. 401, italics added.) Significantly, the record in *Ramirez* contained "no evidence" that the appellant in that case—who was the conservatee's son—had mismanaged her estate or done anything faulty or suspicious in his administration of her trust assets. To the contrary, there was testimony by several expert witnesses to the effect that it would be in the best interests of the conservatee to

[3] In *Ramirez,* as in this case, the proposed conservatee's written nomination of her child to serve as her conservator took the form of a durable power of attorney for assets executed before commencement of the conservatorship proceedings. (*Ramirez, supra,* 90 Cal.App.4th at pp. 393, 400-401.) For purposes of present discussion, we assume without deciding that the durable power of attorney under which appellant exercised her authority over Wilson's assets in this case constituted a written nomination of appellant to serve as Wilson's conservator for purposes of Probate Code section 1810.

leave the management of her assets with her son, rather than introducing strangers to act as her conservators. (*Id.* at pp. 401-402.) On the basis of the record before it, the appellate court held "it is difficult to understand why the [lower] court did not appoint appellant conservator," particularly where the evidence showed "it clearly was in Ramirez's best emotional and financial interests that the court do so." (*Id.* at p. 403.)

The instant case could not be more different. In this case, as seen, there was ample evidence to cast serious doubt on the propriety of appellant's supervision of Wilson's trust assets. By the same token, there was *no* expert testimony adduced in support of appellant's continued management of Wilson's finances. Here, unlike in *Ramirez*, the conservatee's own testimony at the hearing clearly showed that she was completely unaware of the way in which appellant had been draining trust bank accounts and transferring trust assets into joint checking accounts in which appellant commingled her own funds and from which she could easily write checks for her personal purposes. Thus, unlike the appellate court in *Ramirez*, we cannot say the trial court's decision denying Wilson's expressed wish that appellant be appointed her conservator was unsupported by substantial evidence. The trial court's refusal to appoint appellant conservator must be affirmed.

NO VIOLATION OF WILSON'S PRIVACY OR OTHER PRIVILEGE

Next, appellant contends that Wilson's refusal to respond to questions at the hearing about her assets constituted the exercise of an alleged privilege of nondisclosure based on her right to privacy under the California Constitution, and the trial court's finding on the basis of her testimony that she was unable to account for her assets effectively penalized her for exercising this "privilege." The contention is meritless.

There is no privilege allowing a proposed conservatee to refuse to respond to questions posed at a conservatorship hearing, directed at ascertaining his or her knowledge of and ability to manage his or her financial assets. (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 548-449, 550.) Thus, there is no legal basis for appellant's privacy argument. Even if such a privilege *did* exist, the record in this case

clearly shows that—despite her awkward attempts to evade questions about her financial affairs—Wilson simply did not know what assets she had, where they were, or what appellant had been doing with them. In short, the trial court did not err in concluding on the basis of substantial evidence that Wilson was substantially unable to manage her own financial resources or resist fraud or undue influence.

NO ERROR IN ADMITTING TESTIMONY OF DR. STRONG

Finally, appellant asserts that the trial court erred in admitting the testimony of Dr. Strong. Appellant argues that respondent violated the provisions of Code of Civil Procedure section 2032 by obtaining consent from Wilson's attorney for Dr. Strong's examination of Wilson without simultaneously providing appellant with notice or opportunity to object. There was no error.

As here pertinent, Code of Civil Procedure section 2032, subdivision (a) provides that "[a]ny party may obtain discovery . . . by means of a physical or mental examination of (1) a party to the action, (2) an agent of any party, or (3) a natural person in the custody or under the legal control of a party, in any action in which the mental or physical condition . . . of that party or other person is in controversy in the action." Any mental examination conducted under the section must be performed by a licensed physician, or by a licensed clinical psychologist with a doctoral degree in psychology and "at least five years of postgraduate experience in the diagnosis of emotional and mental disorders." (Code Civ. Proc., § 2032, subd. (b).) "If any party desires to obtain discovery . . . by a mental examination, the party shall obtain leave of court. The motion for the examination shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination. The motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt to arrange for the examination by [a written] agreement [of the parties]. Notice of the motion shall be served on the person to be examined and on all parties who have appeared in the action. [¶] The court

shall grant a motion for a . . . mental examination only for good cause shown." (Code Civ. Proc., § 2032, subd. (d).)

Dr. Strong's examination of Wilson was not the kind of civil discovery procedure to which the above statute is directed. The process specified in Code of Civil Procedure section 2032 is an *adversarial* one, to be employed in the course of discovery when one party demands that an *opposing* party submit to examination by the first party's own physician or qualified diagnosing psychologist. As the record shows, the examination in this case was an independent evaluation arranged for the benefit of both Wilson's appointed counsel and respondent as court-appointed temporary conservator, and was part of their own investigation of the claim that the proposed conservatee lacked the mental capacity to manage her financial affairs or to resist fraud or undue influence. Because the examination was performed with the *consent* of Wilson's attorney, there was no need to obtain additional consent to the examination from appellant or appellant's attorney—neither of whom represented Wilson—or to initiate formal adversarial discovery procedures under Code of Civil Procedure section 2032.

Assuming for the sake of argument that Dr. Strong's examination of Wilson was governed by Code of Civil Procedure section 2032—a conclusion we reject—we must disregard any error in permitting the admission of his testimony unless, in light of the entire record, we conclude the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; Evid. Code, § 353.)[4] " '[A] "miscarriage of justice"

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[4] "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

"The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party

should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 770, overruled on other grounds in *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 103; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069-1073.)

On the record in this case, we conclude that it is not reasonably probable that a result more favorable to appellant would have occurred but for the error. There was clearly good cause to obtain an independent mental evaluation of Wilson, whose capacity to manage her affairs was the subject of the entire conservancy proceeding. There is no dispute as to whether Dr. Strong's medical qualifications met the statutory requirements of Code of Civil Procedure section 2032, subdivision (b). The results of Dr. Strong's examination were made available to all the parties, and appellant had the opportunity to depose him at length prior to trial. Neither appellant nor her attorney would have been permitted to participate in the examination had it been held under the auspices of Code of Civil Procedure section 2032.

In any event, Dr. Strong's expert opinion testimony of Wilson's incompetence was simply cumulative of the evaluation of Wilson contained in the capacity declaration prepared by Dr. Wieland's office, as well as the evidence adduced by the testimony of Farley, Cottrell and respondent Herrera. The only contradictory testimony was that of appellant's witness, Dr. Gambin. However, Dr. Gambin's expressed opinion of Wilson's

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complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable is such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." (Code Civ. Proc., § 475.)

"A . . . finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] . . . [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353.)

competence was undermined by his acknowledgement that she had failed memory tests he administered to her, and suffered from memory impairment for which she was required to take medication, as well as from Parkinson's disease-related "behavioral issues" possibly associated with hallucinations. Most important, the trial court's determination was independently supported by the testimony of Wilson and appellant herself, which clearly evidenced Wilson's substantial inability to manage her assets or control the actions of appellant with respect to those assets. There was no miscarriage of justice.

DISPOSITION

The order appointing respondent probate conservator of Roberta Wilson is affirmed. Appellant shall pay respondent's costs on appeal.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Parrilli, J.